

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 1082 of 1996

For Approval and Signature:

Hon'ble MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed : YES
to see the judgements?
 2. To be referred to the Reporter or not? : NO
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge? : NO

STATE BANK OF SAURASHTRA

Versus

MOHMAD HANIF KASIMMIYA

Appearance:

MR SATYAJIT SEN for Petitioner
MR PN BAVISHI for Respondent No. 1
MS SEJAL K MANDAVIA for Respondent No. 2

CORAM : MR.JUSTICE D.P.BUCH

Date of decision: 16/03/2000

ORAL JUDGEMENT

This is an application in Revision under Section 115 of the Code of Civil Prosedure,1908 challenging the order dated 02-04-1996 recorded by the learned Civil Judge(S.D.),Veraval below Ex.6 in Special Civil Suit No.73 of 1995 dismissing the application of the

petitioner for attachment before judgment under Order 38 Rule 5 of the C.P.C. against respondent No.2.

The allegations are that, the petitioner has advanced loan to the first respondent and second respondent is guarantor. It is also alleged that, the first respondent has been attempting to dispose of his immovable properties and therefore, attachment before judgment has been claimed before the trial against respondent No.2.

The Trial Court dismissed the application of the petitioner. Hence, the revision. Mr. Sen appears for the petitioner, Mr. P. N. Bavisi for the respondent No.1 and Miss Mandaviya for the respondent No.2. The arguments advanced by them have been heard.

Miss Mandaviya has argued at the initial stage that, respondent No.2 is only a guarantor and therefore, the petitioner should proceed first against respondent No.1 being the principle debtor. This contention has been negatived in "The Bank of Bihar Ltd. v. Dr. Damodar Prasad and another" reported in A.I.R. 1969 S.C. 297. Therefore, this defence is not available to respondent No.2.

Now, so far the merits are concerned, the allegations have been made before the trial Court against respondent No.1. No allegation has been made against respondent No.2. The petitioner has not stated before the trial Court that, respondent No.2 is about to run away from the jurisdiction of the Court or is about to dispose of his property, with a view to delay or defraud the decree which may be ultimately passed in favour of the petitioner. Since these allegations have not even been made against respondent No.2 before the trial Court, the petitioner was not entitled to an order for attachment before judgment under Order 38 Rule 5 of the C.P. Code. Therefore, the trial Court can not be said to have committed material irregularity relating to jurisdiction in dismissing the application of the petitioner.

The learned advocate for the petitioner has argued that, the petitioner is at liberty to adjust the amount of fixed deposit receipt of respondent No.2 against the dues of respondent No.1, in accordance with "Panjab National Bank and others v. Surendra Prasad Sinha" reported in A.I.R. 1992 S.C. 1815.

Let us not dispute with respect to that right of

the petitioner. Here, the question of the exercise of that right is not subject matter in the dispute. Therefore, the principle will not come to the rescue of the petitioner in getting the order for attachment before judgment under Order 38 Rule 5 of C.P.Code against respondent No.2.

As said above, since there is no allegation against respondent No.2 that, he has been acting dishonestly or fraudulently, there is no question of granting order for attachment before judgment. Consequently, there is no merit in this revision and it is required to be dismissed.

This revision application is accordingly dismissed with costs. The learned advocate for the petitioner has produced today xerox copy of deed of guaranty in accordance with the order of this Court dated 18-12-1997, it may be taken on record. Rules stands discharged.

Learned advocate for the petitioner states at this stage that the operation of this order may be stayed for one month, in order to enable him to obtain appropriate order in S.L.P.

Since there is no interim order in favour of the petitioner till today, there is no question of staying the operation of the above order. Therefore, the request is rejected.

16-03-2000.

(D.P.Buch,J)

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